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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Carriage of the Transmissions of
Digital Television Broadcast Stations

Amendments to Part 76
of the Commission's Rules

CS Docket No. 98-120

To: The Commission

REPLY COMMENTS OF PAPPAS TELECASTING INCORPORATED,
ET AL.

Pappas Telecasting Incorporated, Pappas Telecasting of the
Midlands, a California Limited Partnership, Pappas Concord Partners, Pappas
Telecasting of Nevada, a California Limited Partnership, Pappas Telecasting of
Lexington, a California Limited Partnership, Pappas Telecasting of Opelika, a
California Limited Partnership, Pappas Telecasting of the Carolinas, a California
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Southern California, L.L.C., and Harry J. Pappas and Stella A. Pappas
(collectively, all of the foregoing entities and persons are referred to hereinafter
as "Pappas"), by their undersigned attorney, hereby respectfully submit these
Reply Comments in the above-captioned proceeding, in response to the opening
Comments of various parties. ^{1/}

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^{1/} These Reply Comments are timely filed in accordance with the revised
schedule for submitting reply comments in this proceeding established in
the *Order*, DA 98-2342, adopted and released on November 18, 1998.

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Summary

In these Reply Comments, Pappas identifies some of the major issues that are before the Commission for resolution in this proceeding. Rather than re-argue those issues, Pappas attempts to help the Commission through the voluminous record by directing the Commission to the comments of the parties that Pappas believes most effectively address those issues.

Pappas commends the Comments submitted by the Association for Maximum Service Television, Inc. ("MSTV") on certain First Amendment issues raised by cable television operators and programmers. Pappas notes arguments raised by certain cable companies with respect to the meaning of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act").

Those arguments maintain that cable systems are not required to carry the digital television broadcast ("DTV") transmissions of stations until the end of the transition period. Pappas demonstrates that those arguments cannot be reconciled with the language of the statute itself, its overall scheme for regulating cable carriage of broadcast signals, or the context of the statute's adoption and related Congressional findings.

Pappas reviews the concerns expressed by certain cable interests that imposing must carry obligations for DTV will force cable systems to drop popular cable channels. In that respect, Pappas refers the Commission to the Comments of the Association of Local Television Stations ("ALTV"), as well as Pappas's own Comments and those of MSTV.

These Reply Comments also address the view expressed by certain cable commenters that mandating carriage of both analog and DTV transmissions would violate the 1992 Act. With reference to Pappas's own Comments, Pappas herein demonstrates why that argument fails.

Pappas urges the Commission's consideration of Comments filed by several parties with respect to the need to ensure the protection of electronic program guide and other navigational devices contained in DTV transmissions. Pappas endorses the Comments of Circuit City Stores, Inc. with regard to whether the cable industry should bear the cost of mandatory cable carriage of DTV. Pappas takes issue with commenters who urge the Commission to delay action in this proceeding. Pappas commends ALTV's Comments on the issue of whether input selector devices provide an alternative to must carry for DTV. Finally, Pappas notes an encouraging report from Sony Electronics, Inc. on digital interfaces for cable set-top boxes.

Introduction

Pappas submitted its Comments in this proceeding on October 13, 1998, addressing in detail most of the issues raised in the Commission's *Notice of Proposed Rule Making*, 13 FCC Rcd 15092 (released July 10, 1998) (the "*NPRM*"). By Pappas's count, there are more than 180 comments, letters, notices, written *ex parte* presentations, written memoranda of oral *ex parte* presentations, and miscellaneous other filings that have been submitted in this

proceeding. The sheer number and volume of those filings, and the complexity of many of the issues, may threaten to overwhelm the Commission. In an effort to assist the Commission, and in lieu of simply re-arguing points that have already been adequately presented in Pappas's Comments and in the comments of other parties, Pappas will devote these Reply Comments to identifying some of the major issues that the Commission must resolve in this proceeding and where those issues (in Pappas's opinion) are most cogently addressed in the record.

The First Amendment

Various cable television interests -- including both cable operators and cable programmers ^{2/} -- put forth the argument in their comments that imposition by the Commission of must carry requirements for DTV transmissions would be found by the courts to violate the cable systems' First

^{2/} See, e.g., Comments of BET Holdings II, Inc.; Comments of Home Box Office and Turner Broadcasting System, Inc.; Comments of Tele-Communications, Inc.; Comments of the C-SPAN Networks; Comments of Discovery Communications, Inc.; Comments of Ameritech New Media.

Amendment rights. While there are a number of credible expositions to the contrary, Pappas has found that the most convincing submissions on this point are the Comments of the National Association of Broadcasters ("NAB") and the Comments of MSTV.

In particular, MSTV's Comments demonstrate that the Congressional findings supporting the adoption of the must carry requirements in Section 614 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Act"), codified at 47 U.S.C. Section 534 (1997), apply with at least as much force to DTV as to analog broadcasting. Based upon those findings, and the Supreme Court's deference to them in *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"), MSTV concludes -- and Pappas concurs -- that not only would the imposition of must carry for DTV be upheld under an intermediate-scrutiny First Amendment analysis, but that the Commission is limited in its ability to revisit those Congressional findings on the basis that they somehow do not apply to DTV. As MSTV's Comments show, the Congressional findings supporting Section 614 of the 1992 Act were not dependent upon whether the broadcast medium that Congress was seeking to protect was formatted in an

analog or a digital mode. The argument that *Turner II* somehow doesn't apply to DTV, because DTV is distinct from analog broadcasting, fails -- as MSTV shows -- because the distinction is without a difference of any decisional significance. Pappas strongly commends MSTV's Comments to the Commission on this issue.

Section 614(b)(4)(B) of the 1992 Act

Some of the comments from the cable industry suggest that Section 614(b)(4)(B) of the 1992 Act, codified at 47 U.S.C. Section 534(b)(4)(B) (1997), should be read to require mandatory carriage of the DTV transmissions of broadcasting stations only at such time as the broadcaster shall have migrated its service exclusively to its DTV station and shall have returned its license from the Commission for its analog station back to the Commission. *See, e.g.*, Comments of GTE ("GTE"); Comments of Discovery Communications, Inc. ("Discovery"); Comments of Time Warner Cable ("TWC").

The arguments of GTE, Discovery, and TWC on this point rely heavily upon their interpretation of Section 614(b)(4)(B)'s command that the Commission initiate a rule making proceeding to change its must carry rules in order to ensure cable carriage of broadcast signals of local commercial television stations "which have been changed" to conform to the Commission's transmission standards for DTV. According to GTE, Discovery, and TWC, that means that the broadcaster must have completely abandoned its analog transmissions and migrated to DTV before the latter is subject to must carry.

Pappas submits that the interpretation that GTE, Discovery, and TWC attempt to place upon Section 614(b)(4)(B) is facially absurd. Had Congress intended to convey the meaning that GTE, Discovery, and TWC place upon the statute, Congress would not have used the word "changed;" it would have used the phraseology that TWC itself uses to describe the point in time when TWC believes that DTV must carry obligations should attach -- ". . . [when] each station completes its transition from analog to digital and returns its second channel."^{3/} Congress did no such thing. Rather, in the context of the

^{3/} As pointed out in the Comments of the Consumer Electronics (continued...)

1992 Act which made extensive findings concerning the importance of preserving the accessibility of free, over-the-air television to all Americans (including both cable subscribers and non-subscribers) and concerning the cable industry's economic incentives for and historical practice of using its bottleneck position to impede such access, Congress told the Commission to modify its must carry rules to ensure cable carriage of DTV signals that represent the same free, over-the-air service and that are equally (if not more) susceptible to cable's historical anticompetitive signal carriage predilections as the analog signals that Congress was indisputably trying to protect. GTE's, Discovery's, and TWC's strained interpretation of the word "changed" in Section 614(b)(4)(B) fails because it stands opposed to the entire scheme and context of Congress's adoption of the statute.

3/ (...continued)

Manufacturers Association, at the time that Congress enacted Section 614(b)(4)(B), the Commission had already adopted proposals to designate a second channel for broadcasters to use to transmit DTV programming while the first channel remained on the air for analog transmissions during a transitional period. Had Congress intended that the must carry obligations for DTV adopted in Section 614(b)(4)(B) only attach at such time as the broadcaster had migrated from the analog channel to the DTV channel and surrendered the analog channel to the Commission, Congress could have said so, since it was clearly informed of the Commission's transitional scheme when it passed Section 614(b)(4)(B).

Cable Channel Capacity

A number of the comments from the cable industry ^{4/} complain that requiring cable systems to carry the DTV transmissions of local television stations would compel those systems to drop popular cable programming in order to make room for the local stations' DTV bit streams.

Pappas submits that the Comments of ALTV provide a sound rebuttal to the cable industry's concerns. ALTV points out cable's history of exaggerating its capacity limitations in the context of the adoption of the 1992 Act's must carry requirements. Specifically, ALTV notes that in *Turner II*, the Supreme Court found that notwithstanding cable's complaint that must carry for analog stations would impose a Constitutionally-impermissible burden upon a cable operator's First Amendment rights, 95.5% of cable systems nationwide were not required to drop a single incumbent channel in order to comply with

^{4/} See, e.g., Comments of the International Cable Channel, *et al.*; Comments of the C-SPAN Networks; Comments of Ovation, Inc.; Comments of Home and Garden Television; Comments of the Weather Channel, Inc.; Comments of Discovery; Comments of the Pennsylvania Cable Network; Comments of Michigan Government Television; Comments of ZDTV.

Section 614, and the remaining 4.5% of cable systems had to drop an average of only 1.22 cable services in order to achieve compliance. The Court also found that cable systems nationwide were able to carry 99.8% of the programming that they had carried before enactment of Section 614.

ALTV points out that while C-SPAN has been most vocal about the supposed likelihood of cable drops of C-SPAN and C-SPAN II, the NAB has previously pointed out that C-SPAN's cable subscribership grew by 16% and C-SPAN II's cable subscribership grew by 52% since Section 614 was adopted. ^{5/}

The Comments of ALTV, MSTV, and Pappas devote some attention to the self-generated expansion of cable system channel capacity. Without government prompting, the cable industry has seen the wisdom of

^{5/} In that context, Pappas also directs the Commission's attention to the Comments of Regina LaBelle, President of Citizens for C-SPAN in Seattle, Washington. Ms. LaBelle expresses her concern that adoption of DTV must carry may force cable systems to drop C-SPAN's programming. However, her own Comments disclose that after the cable system in Seattle cut C-SPAN's programming in half in 1997, a public outcry resulted in the restoration of the lost programming. Her story is instructive in teaching us how at least some cable operators make use of channel capacity and how "limitations" on such capacity tend to disappear in the face of an expression of popular will.

growing its channel capacity and is doing so at a pace that promises to afford ample "shelf space" (to use Discovery's phrase) available in time to accommodate all of the popular cable channels and the DTV signals of local broadcast stations, some of which are not due to come on line for another three years or more. ^{6/}

In any event, Section 614(b)(2)(B) of the 1992 Act, codified as 47 U.S.C. Section 534(b)(2)(B) (1997), places an upper limit upon the must carry burden of cable systems having 12 or more usable activated channels. That statute provides that such systems may not be required to devote more than one-third of their total number of such channels to local commercial television stations whose signals are entitled to mandatory carriage. That one-third cap applies to both analog and DTV must carry signals, and therefore protects two-thirds of qualified cable systems' channel capacity from the must carry obligations of the 1992 Act. To the extent that the Supreme Court in *Turner II*

^{6/} See also the Comments of the Consumer Electronics Manufacturers Association ("CEMA") on this point. *Inter alia*, CEMA points out that until May of 2002, only the four largest stations in the 30 largest markets are required to commence DTV service. Moreover, CEMA observes that two 6 MHz over-the-air DTV signals can be compressed and carried within a single 6 MHz cable channel.

has already ruled, at least by implication, that the one-third cap is not an unreasonable burden upon cable operators' First Amendment rights, the cable industry's Constitutional saber-rattling loses much of its force.

Duplication between Analog and DTV

BET Holdings, Inc. ("BET") and Discovery, in their respective Comments, argue that imposing an obligation upon cable systems to carry both the analog and the DTV transmissions of a local television broadcaster would contravene Section 614(b)(5) of the 1992 Act, codified at 47 U.S.C. Section 534(b)(5) (1997). That Section provides that a cable system is not required to carry the "signal" of a local commercial television station that substantially duplicates the "signal" of another such station which is carried on the cable system.

As is pointed out in Pappas's Comments, the provisions of Section 614(b)(5) do not apply to the simultaneous transmission by a broadcaster of analog and DTV transmissions, even when such transmissions contain identical programming content. The statute uses the word "signal," rather than the word

“program,” indicating that the anti-duplication provision is not intended to relieve a cable system of its dual must carry obligations with respect to analog and DTV signals having identical program content but which are transmitted in different formats. Pappas’s Comments point out that the interpretation urged by BET and Discovery would have the effect of causing the Commission’s *Fifth Report and Order* in the DTV proceeding (the “*Fifth Report and Order*”) ^{2/} to contradict itself. The *Fifth Report and Order* adopted the requirement that a broadcaster’s analog and DTV transmissions commence limited program simulcasting during the transition period, leading to a 100% simulcast requirement after April 1, 2005. However, the *Fifth Report and Order* also explicitly disavowed any attempt to address DTV must carry, and deferred that issue to the instant proceeding. 12 FCC Rcd 12809 at 12853 , Para. 106. If BET’s and Discovery’s reading of Section 614(b)(5) were correct, then the *Fifth Report and Order*’s simulcasting requirement would effectively have relieved cable systems of DTV must carry, even though the *Fifth Report and Order* claimed it was not

^{2/} *Fifth Report and Order* in MM Docket No. 87-268, *In the Matter of Advanced Television Systems and their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809 (1997), *modified on reconsideration*, 13 FCC Rcd 6860 (1998).

attempting to address that issue. Plainly, BET's and Discovery's position is not defensible and must be rejected.

Electronic Program Guides

The Comments of National Broadcasting Company, Inc. ("NBC") and the separate Comments of Thomson Consumer Electronics Corporation ("Thomson") raise an important issue. NBC points out that as cable systems' channel capacity increases, subscribers will need some form of program guide or navigational device to assist them in locating desired programming from among dozens -- perhaps hundreds -- of choices. Cable systems may offer their own proprietary on-screen electronic program guides ("EPGs"). Given the fact that the ownership of many cable operators is vertically integrated with the ownership of cable programmers whose fare is carried on such commonly-owned cable systems, there is an incentive for the operators to use their EPGs to favor selection of their affiliates' programs. Among other things, NBC and Thomson recommend that if a broadcaster chooses to incorporate a PSIP protocol, EPG data, or other navigational information in its DTV transmission, in order to assist viewers in linking a station's DTV signal to its analog channel number, the

cable system should not be permitted to strip those data out of the DTV signal in retransmitting it. NBC and Thomson also advocate the adoption of regulations that will prohibit a cable operator from constructing or using its on-screen program menus to favor that operator's affiliates' channels or to disadvantage broadcast programming. ^{8/} Pappas strongly endorses the views of NBC and Thomson in these respects.

Who Should Bear the Costs?

The Comments of Circuit City Stores, Inc. ("Circuit City") point out that all of the industries affected by the transition from analog to DTV -- broadcasters, programmers, and equipment manufacturers -- are incurring extensive costs in that endeavor. ^{9/} To date, only the cable industry has attempted to shift onto others the costs of its participation in this grand national undertaking. As Pappas pointed out in its Comments, the Commission's *Fourth*

^{8/} *Accord*, Comments of Phillips Electronics North America Corporation.

^{9/} Circuit City estimates that the broadcasting industry alone will spend more than \$16 billion for new digital transmission and production equipment.

Annual Report to Congress on the state of competition in multichannel video programming distribution, *In the Matter of Annual Assessment of the Status of Competition for the Delivery of Video Programming*, CS Docket No. 97-141, 13 FCC Rcd 1034 (1998), testifies to the robust and growing financial health of the cable television industry. It is unseemly in the extreme for an industry enjoying such economic vigor to complain about, and to try to shift on to others, the costs of improving its own service to its customers.

Timing

Some cable commenters, *e.g.*, GTE, Armstrong Holdings, Inc., *et al.*, America's Health Network, *et al.*, the Office of Communication of the United Church of Christ, *et al.*, Discovery, and Microsoft Corporation, contend that it is premature for the Commission to adopt DTV must carry requirements. They urge the Commission to defer action in this proceeding, pending further developments in the affected industries.

Pappas wishes it could join in urging procrastination; sometimes difficult decisions become less so, if given time. However, Pappas cannot

endorse delay in this instance. The Commission has imposed upon the broadcasting industry affirmative obligations to commence DTV transmissions by certain dates. As is pointed out in Pappas's Comments, broadcasters need to be able to finance their DTV build-out well in advance of the Commission's service inauguration deadlines. Lenders are keen to know whether the Commission will require the cable gatekeepers to two-thirds of the national television audience to carry the signals of the new and untried DTV medium, or whether this already-risky enterprise will be burdened with an additional handicap requiring potentially-expensive retransmission consent agreements to forestall the loss of two out of every three available viewers. In order to provide certainty on this issue that is pivotal to the financing of the DTV construction, Pappas urges the Commission to conclude this proceeding as rapidly as possible and to provide such certainty at the earliest practicable time.

A/B Switches

The separate Comments of the Cable Telecommunications Association, Home Box Office and Turner Broadcasting System, Inc., Discovery, and the International Channel, *et al.*, urge the Commission to

consider the use of input selector devices, sometimes known as "A/B switches," as an alternative to DTV must carry. Pappas disagrees and commends to the Commission the Comments of ALTV in that regard. ALTV's Comments demonstrate that Congress, in the 1992 Act, found the use of A/B switches to be an ineffective answer to the need for must carry,^{10/} and point out that the basis for those findings would be even more compelling for DTV must carry. That is because, as ALTV observes, DTV signals during the transitional period have in many cases been "shoe-horned" in between other analog and DTV channel assignments, with various compromises in power levels and channel separations, and may present serious consumer reception problems. In addition, a cable subscriber opting to access his or her local station's DTV transmissions by means of an input selector device would not see the same, familiar on-screen EPG that he or she will have grown accustomed to seeing when watching cable-delivered programming. The cable subscriber will inevitably tend to disfavor the local DTV signal, to the detriment of the success of the transition from analog to digital.

^{10/} ALTV's Comments quote a passage from the Supreme Court's decision in *Turner II* in which the Court mentioned that a cable television industry association had conceded that the A/B switch is not a workable solution to the carriage problem.

Digital Interface and Connection Issues

Turning to a final and less controversial aspect of the comments, Pappas commends to the Commission the Comments of Sony Electronics, Inc. ("Sony"). Sony's Comments provide encouraging news with respect to the viability of the IEEE 1394 (i.LINK) digital interface. More importantly, as Sony notes, that technical breakthrough was achieved as a consequence of the collaboration among the broadcasting, cable programming, and electronic equipment industries. With content protection, Sony submits, the IEEE 1394 (i.LINK) interface will satisfactorily resolve most interface/connection issues with respect to digital set-top boxes. ^{11/}

WHEREFORE, Pappas respectfully urges the Commission to amend its rules in accordance with the Pappas' Comments in this proceeding and these Reply Comments.

^{11/} See also the Comments of Mitsubishi Electric America, arguing that continuing progress is being made among the affected parties with respect to the IEEE 1394 interface to forestall the need for Commission intervention at this time.

Respectfully submitted,

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Certificate of Service

I, Alicia M. Altamirano, a secretary in the law firm of Paul, Hastings, Janofsky & Walker LLP, hereby certifies that I have on this 22nd day of December, 1998, caused copies of the foregoing **Reply Comments of Pappas Telecasting Incorporated, et al.** to be mailed to the following by first-class United States mail, postage prepaid:

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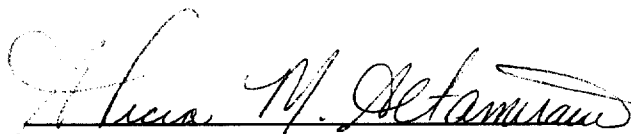
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